

UNITED STATES DISTRICT COURT

Northern District of California

San Francisco

MIGUEL LOTA,

Plaintiff,

v.

HOME DEPOT USA, INC.,

Defendant.

No. C 11-05777 YGR (LB)

**NOTICE OF REFERRAL AND
ORDER (1) REGARDING FURTHER
SUBMISSIONS IN SUPPORT OF
PETITION FOR APPOINTMENT OF
GUARDIAN AD LITEM AND (2)
SETTING HEARING DATE**

[Re: ECF Nos. 19, 24]

In this action, Miguel Lota has sued his former employer for employment discrimination. Notice of Removal, ECF No. 1, Ex. A. On April 23, 2012, the district court referred Mr. Lota's counsel's Petition for Appointment of *Guardian Ad Litem* to a magistrate judge for a report and recommendation, and the Petition was referred to the undersigned. Petition, ECF No. 19; Referral Order, ECF No. 24.

Federal Rule of Civil Procedure 17 governs the capacity of parties to sue or be sued in federal court. Courts must look to the law of the state of the individual's domicile to determine whether that party has capacity to participate as a party in the litigation. Fed. R. Civ. P. 17(b)(1). In California, a party is incompetent if it lacks the capacity to understand the nature or consequences of the proceeding, or is unable to assist counsel in the preparation of the case. *See In re Jessica G.*, 93 Cal. App. 4th 1180, 1186 (2001) (applying this standard to dependency proceedings); *see also* Cal. Prob. Code § 1801 and Cal. Pen. Code § 1367; *In re Sara D.*, 87 Cal. App. 4th 661, 666-67. A court may

1 find a party incompetent only if a preponderance of the evidence supports such a finding. *See*
 2 *Jessica G.*, 93 Cal. App. 4th at 1186. A *guardian ad litem* may be appointed for an incompetent
 3 adult only (1) if he or she consents to the appointment or (2) upon notice and hearing. *See id.* at
 4 1187-88.

5 Here, the Petition contains the following allegations:

- 6 1. Mr. Lota is incompetent because he suffers from mental retardation, has impaired memory and
 7 speech, and is unable to read or write;
- 8 2. Because of Mr. Lota's incompetence, the appointment of a *guardian ad litem* is necessary to
 9 protect his interests in this action;
- 10 3. Ms. Lota, the proposed *guardian ad litem*, is Mr. Lota's wife, and she has been his wife since
 11 July 6, 1992;
- 12 4. Ms. Lota is competent and qualified to understand and protect Mr. Lota's rights and has no
 13 interests adverse to Mr. Lota's interests in this action; and
- 14 5. Ms. Lota consents to her appointment as *guardian ad litem* for Mr. Lota.

15 Petition, ECF No. 19 at 1-2. The Petition also includes Ms. Lota's declaration "under penalty of
 16 perjury under the laws of the State of California that the foregoing [P]etition is true and correct." *Id.*
 17 at 2.

18 The district court, in its order referring the Petition to a magistrate judge for a report and
 19 recommendation, suggested that additional documentation might assist the court in its determination.
 20 Referral Order, ECF No. 24 at 1. Such documentation would address whether Mr. Lota has a
 21 representative (such as a general guardian, conservator, or other like fiduciary), whether there has
 22 been any prior adjudication of Mr. Lota's mental competence or capacity, and whether Ms. Lota is
 23 qualified to be appointed as Mr. Lota's *guardian ad litem*. *Id.*; see *Sarracino v. Superior Court*, 13
 24 Cal.3d 1, 12 (1974) (finding petition for appointment of guardian ad litem sufficient where
 25 accompanied by guardian's declaration setting out facts in support of the petition's allegations).

26 In light of the District Court's suggestion and the legal standards set forth above, the court
 27 believes that the submission of further information and a hearing on the Petition is appropriate. In
 28 that regard, Mr. Lota's attorney shall file a letter brief (not to exceed 5 pages) and additional

1 declaration(s) addressing the above-referenced points and setting forth additional facts regarding the
2 same. The letter brief and declaration(s) shall be filed by May 18, 2012. Defendant may, but need
3 not, file a letter brief in response by May 25, 2012. Further, the court sets a hearing on Mr. Lota's
4 counsel's Petition on June 21, 2012 at 11:00 in Courtroom C, 15th Floor, United States District
5 Court, 450 Golden Gate Avenue, San Francisco, California, 94102.

6 **IT IS SO ORDERED.**

7 Dated: May 1, 2012

8 
9 LAUREL BEELER
United States Magistrate Judge

UNITED STATES DISTRICT COURT
For the Northern District of California